

**AGREEMENT BETWEEN SHELBY COUNTY, TENNESSEE AND EMERGE MEMPHIS FOR
USE OF GRANT PROCEEDS TO FUND INFRASTRUCTURE IMPROVEMENTS**

This agreement (the "Agreement") entered into this ____ day of November, 2007, by and between Shelby County, Tennessee, hereinafter referred to as "COUNTY" and Memphis Incubator Systems, Inc. (dba Emerge Memphis) hereinafter referred to as "EMERGE."

WITNESSETH

WHEREAS, the COUNTY has received a grant from the Tennessee Department of Economic and Community Development ("ECD") through its Fast Track Infrastructure Development Program, more specifically referenced as Contract No. ____ and TBD ____ and Project Identification o. TBD ____, a copy of which is attached hereto as **Exhibit "A"** and incorporated herein by reference as if stated verbatim; and

WHEREAS, this grant (hereinafter "ECD" grant) will be used by the COUNTY to pay for the costs of renovating the fourth floor of the EmergeMemphis building at 516 Tennessee Street, Memphis, Tennessee; and

WHEREAS, COUNTY anticipates that the maximum amount of the ECD grant shall be Six Hundred Thousand Dollars (\$600,000.00); and

WHEREAS, the parties desire to enter into an agreement setting forth the terms of such payments to be made by the COUNTY to EMERGE.

NOW THEREFORE, for and in consideration of the premises and mutual promises contained herein and for good and other valuable consideration, the parties hereby agree as follows:

SECTION 1. REIMBURSEMENT PROCESS:

- 1.01 The parties acknowledge that the COUNTY anticipates that the source of funding for costs associated with the infrastructure improvements in and around the EmergeMemphis building shall be provided through the ECD grant and that EMERGE must provide a 33% match, as set forth in the Project Budget, attached hereto and incorporated herein by reference, as if stated verbatim in **Exhibit "C"**. Any revision of the budget, as set forth in **Exhibit "C"**, whether in the budget amount or in the use of funds, is subject to prior written approval by the COUNTY.
- 1.02 In addition to the 33% grant match that EMERGE agrees that it will take financial responsibility for the Grantee Participation amount of \$617,474.00 as referenced in Attachment A of Exhibit A of this Agreement.
- 1.03 As used herein, the term costs shall include, but is not limited to, all out-of-pocket costs and expenses reasonably incurred in connection with the design, construction and renovation of the fourth floor of the EmergeMemphis building, more particularly described in the plans therefore listed on **Exhibit "B"** attached hereto and incorporated herein by reference as if stated verbatim and hereinafter known as "Project".

SECTION 2. TERM AGREEMENT:

- 2.01 This Agreement shall commence on the date of execution hereof by all parties and shall remain in effect for the term of the ECD grant.

- 2.02 In the event COUNTY decides to terminate this Agreement based upon EMERGE's failure to fulfill in a timely and proper manner its obligation under this Agreement, EMERGE shall immediately become directly responsible for all costs incurred pursuant to the Agreement of which shall be incurred by COUNTY. Such termination shall not relieve EMERGE of any damages sustained by the County and shall be in addition to any other remedies available for such breach in law or equity.
- 2.03 Nothing in this Agreement shall be construed as prohibiting COUNTY from pursuing any other available remedies, including without limitation, injunctive relief and monetary damages.

SECTION 3. NOTICES:

- 3.01 All notices to be given hereunder shall be in writing and shall be delivered by U.S. Mail, return receipt requested, by a nationally recognized overnight delivery service or by hand delivery, and shall be deemed to have been received when either deposited in United States Postal Service mailbox or personally delivered with signed proof of delivery, to the following addresses or such other addresses as either of the parties shall give notice of from time to time during the term hereof:

COUNTY:

Shelby County Division of Community Services
160 North Main Street, Suite 801
Memphis, Tennessee 38103
Attn: Dottie Jones

Send copy to:

Shelby County Government
c/o Contracts Administration
160 N. Main Street, Suite 550
Memphis, Tennessee 38103

EMERGE:

Emerge Memphis
Attn: Gwin Scott
516 Tennessee Street
Memphis, Tennessee 38103

SECTION 4. INDEMNIFICATION

- 4.01 EMERGE shall indemnify, defend, save and hold harmless the COUNTY, its officers, agents and employees from all suits, claims, actions or damages of any nature arising out of or relating to breach of this Agreement by EMERGE or arising out of or relating to any negligent act or omission of EMERGE, its agents or employees which occurs pursuant to the performance of this Agreement. This indemnification shall survive the expiration or termination of this Agreement.
- 4.02 The COUNTY shall not have an obligation to provide legal counsel or defense to EMERGE or any of its agents or employees in the event that a suit, claim, or action of any character is brought by any person or party to this Agreement against EMERGE or its agents or employees as a result of or relating to EMERGE's obligation hereunder. The COUNTY shall not have an obligation

for the payment of any judgments or the settlement of any claims against EMERGE or its agents or employees as a result of or relating to EMERGE's obligation hereunder.

- 4.03 EMERGE shall immediately notify the COUNTY, c/o County Attorney, 160 N. Main Street, Suite 600, Memphis, Tennessee, 38103, of any claim or suit made or filed against EMERGE, its agents or employees regarding any matter resulting from or relating to EMERGE's obligations under this Agreement and will cooperate, assist, and consult with the COUNTY in the defense or investigation thereof.

SECTION 5. FINANCIAL COMMITMENT:

- 5.01 EMERGE agrees to provide within ten (10) days of the effective date of this Agreement an Irrevocable Letter of Credit from a Tennessee bank in the amount of Six Hundred Thousand Dollars (\$6000,000.00), at its own expense, until such time that the project is completed and until all costs have been fully reimbursed.

SECTION 6. INSURANCE REQUIREMENTS:

- 6.01 EMERGE shall purchase and maintain, in a company or companies licensed to do business in the State of Tennessee, such insurance as will protect the COUNTY from claims which may arise out of or result from EMERGE's operations under the Contract, whether such operations are performed by himself or by any subcontractors or by anyone directly or indirectly employed by any of them, or by anyone who whose acts EMERGE or subcontractor may be liable.
- 6.02 The insurance required shall be written for not less than any limits of liability specified or required by law, whichever is greater. Shelby County Government, its elected officials, appointees and employees will be named as additional insured. All policies will provide for thirty (30) days written notice to COUNTY of cancellation or material change in coverage provided. EMERGE will maintain throughout the life of this Contract insurance, through insurers rated A- or better by A.M. Best, in the following minimum requirements:
- (i) Professional Liability Insurance - \$1,000,000.00 per claim/\$3,000,000.00 annual aggregate, indicating if coverage is on occurrence basis or claims-made.
 - (ii) Commercial General liability Insurance - \$1,000,000.00 limit per occurrence bodily injury and property damage/\$1,000,000.00 personal and advertising injury/\$2,000,000.00 General Aggregate/\$2,000,000.00 Products-completed Operations Aggregate, indicating the coverage is provided on a claims-made or on an occurrence basis. The insurance shall include coverage for the following:
 - a. Premise/Operation;
 - b. X,C & U;
 - c. Products/Completed Operations;
 - d. Contractual;
 - e. Independent Contractors;
 - f. Broad Form Property Coverage;
 - g. Personal Injury
 - (iii) Workers Compensation and Employers' Liability Insurance – Workers Compensation statutory limits as required by Tennessee. This policy should include Employers' Liability Coverage for \$1,000,000.00 per accident.

- (iv) Business Automobile Liability Insurance - \$1,000,000.00 each accident for property damage and personal injury. Coverage is to be provided on all owned/leased autos, non-owned autos and hired autos.
- 6.03 EMERGE shall provide COUNTY with a current copy of the Certificate of Insurance at the time of contracting and shall maintain said insurance during the entire Contract period as well as provide renewal copies on each anniversary date. The certificate holder is to read:

Shelby County Government
Purchasing Department
160 N. Main, Suite 550
Memphis, Tennessee 38103

- 6.04 Upon termination or cancellation of insurance currently in effect under this Contract, EMERGE shall purchase an extended reporting endorsement and furnish evidence of same to the County.

SECTION 7. MISCELLANEOUS GENERAL PROVISIONS:

7.01 CONFLICT OF INTEREST:

EMERGE covenants that it has no public or private interest, and will not acquire directly or indirectly any interest which would conflict in any manner with the performance of the Services. EMERGE warrants that no part of the total Contract Fee shall be paid directly or indirectly to any officer or employee of the COUNTY as wages, compensation, or gifts in exchange for acting as officer, agent, employee, subcontractor or consultant to EMERGE in connection with any work contemplated or performed relative to this Contract.

7.02 CONTINGENT FEES:

EMERGE warrants that it has not employed or retained any company or person other than a bona fide employee working solely for EMERGE, to solicit or secure this Contract, and that it has not paid or agreed to pay any company or person, other than a bona fide employee working solely for EMERGE any fee, commission, percentage, brokerage fee, gift or any other consideration contingent upon or resulting from the award or making of this Contract. For breach or violation of this warranty, the COUNTY will have the right to recover the full amount of such fee, commission, percentage, brokerage fee, gift or other consideration.

7.03 EMPLOYMENT OF COUNTY WORKERS:

EMERGE will not engage, on a full, part-time, or any other basis during the Term of the Contract, any professional or technical personnel who are or have been at any time during the Term of the Contract in the employ of the COUNTY.

7.04 ACCESS TO RECORDS:

During all phases of the work and Services to be provided hereunder, EMERGE agrees to permit duly authorized agents and employees of the COUNTY to enter EMERGE's offices for the purpose of inspections, reviews and audits during normal working hours. Reviews may also be accomplished at meetings that are arranged at mutually agreeable times and places. EMERGE will maintain all books, documents, papers, accounting records, and other evidence pertaining to the Fee paid under this Contract and make such materials available at their offices at all reasonable times during the Term of this Contract and for three (3) years from the date of payment under this Contract for inspection by the COUNTY or by any other governmental entity or agency participating in the funding of this Contract, or any authorized agents thereof. Copies of said records shall be furnished to the COUNTY upon request.

7.05 ARBITRATION:

Any dispute concerning a question of fact in connection with the work not disposed of by agreement between EMERGE and COUNTY will be referred to the Shelby County Contract Administrator or its duly authorized representative, whose decision regarding same will be final.

7.06 RESPONSIBILITIES FOR CLAIMS AND LIABILITIES:

- (i) EMERGE shall indemnify, defend, save and hold harmless the COUNTY, and its elected officials, officers, employees, agents, assigns, and instrumentalities from and against any and all claims, liability, losses or damages----including but not limited to Title VII and 42 USC 1983 prohibited acts----arising out of or resulting from any conduct; whether actions or omissions; whether intentional, unintentional, or negligent; whether legal or illegal; or otherwise that occur in connection with or in breach of this Contract or in the performance of the Services hereunder, whether performed by EMERGE its subcontractors, agents, employees or assigns. This indemnification shall survive the termination or conclusion of this Contract.
- (ii) EMERGE expressly understands and agrees that any insurance protection required by this Contract or otherwise provided by EMERGE shall in no way limit the responsibility to indemnify, defend, save and hold harmless the COUNTY or its elected officials, officers, employees, agents, assigns, and instrumentalities as herein provided.
- (iii) The COUNTY has no obligation to provide legal counsel or defense to EMERGE or its subcontractors in the event that a suit, claim or action of any character is brought by any person not a party to this agreement against EMERGE as a result of or relating to performance of the Services under this Contract.
- (iv) Except as expressly provided herein, the COUNTY has no obligation for the payment of any judgment or the settlement of any claims against EMERGE as a result of or relating to performance of the Services under this Contract.
- (v) EMERGE shall immediately notify the COUNTY of any claim or suit made or filed against EMERGE or its subcontractors regarding any matter resulting from or relating to EMERGE's performance of the Services under this Contract and will cooperate, assist and consult with the COUNTY in the defense or investigation thereof.

7.07 GENERAL COMPLIANCE WITH LAWS:

- (i) EMERGE certifies that it is qualified or will take steps necessary to qualify to do business in the State of Tennessee and that it will take such action as, from time to time, may be necessary to remain so qualified and it shall obtain, at its expense all licenses, permits, insurance, and governmental approvals, if any, necessary to the performance of the Services under this Contract.
- (ii) EMERGE is assumed to be familiar with and agrees that at all times it will observe and comply with all federal, state, and local laws, ordinances, and regulations in any manner affecting the performance of the Services. The preceding shall include, but is not limited to, compliance with all Equal Employment Opportunity laws, the Fair Labor Standards Act, Occupational Safety and Health Administration (SHA) requirements, and the Americans with Disabilities Act (ADA).
- (iii) This Contract will be interpreted in accordance with the laws of the State of Tennessee. By execution of this Contract, EMERGE agrees that all actions, whether sounding in contract or in tort, relating to the validity, construction, interpretation and enforcement of this Contract will be instituted and litigated in the courts of the State of Tennessee, located in Shelby County, Tennessee, and no other. In accordance herewith, the parties to this Contract submit to the jurisdiction of the courts of the State of Tennessee located in Shelby County, Tennessee.

7.08 NON-DISCRIMINATION:

EMERGE hereby agrees, warrants, and assures compliance with the provisions of Title VI and VII of the Civil Rights Act of 1964 and all other federal statutory laws which provide in whole or in part that no person shall be excluded from participation or be denied benefits of or be otherwise subjected to discrimination in the performance of this Contract or in the employment practices of EMERGE on the grounds of handicap and/or disability, age, race, color, religion, sex, national origin, or any other classification protected by federal, Tennessee State Constitutional or statutory law. EMERGE shall upon request show proof of such non-discrimination and shall post in conspicuous places available to all employees and applicants notices of non-discrimination.

7.09 ENTIRE AGREEMENT:

This Contract represents the entire and integrated agreement between the parties and superseded all prior negotiations, representations or agreements, whether oral or written.

7.10 AMENDMENT:

This Contract may be modified or amended only by written instrument signed by both parties.

7.11 SEVERABILITY:

If any provisions of this Contract is held to be unlawful, invalid or unenforceable under any present or future laws, such provision shall be fully severable; and this Contract shall then be construed and enforced as if such unlawful, invalid or unenforceable provision had not been a part hereof. The remaining provisions of this Contract shall remain in full force and effect and shall not be affected by such unlawful, invalid or unenforceable provision or by its severance here from. Furthermore, in lieu of such unlawful, invalid, or unenforceable provision, there shall be

added automatically as a part of this Contract a legal, valid and enforceable provision as similar in terms to such unlawful, invalid or unenforceable provision as possible.

7.12 PERFORMANCE AND LABOR AND MATERIALS BONDS:

EMERGE will provide COUNTY within ten (10) days from inception date of this Contract a Performance and Labor and Materials Bond each in the amount of 100% of the Contract price for each year that this contract is in effect. Said Bonds may be pro-rated for the initial year in the event that this period of time is less than a full twelve (12) month period.

7.13 INCORPORATION OF OTHER DOCUMENTS:

- (i) EMERGE shall provide Services pursuant to this Contract in accordance with the terms and conditions set forth within the Shelby County Request for Proposals/Bids as well as the Response of EMERGE thereto, all of which are maintained on file within the Shelby County Purchasing Department and incorporated herein by reference.
- (ii) It is understood and agreed between the parties that in the event of a variance between the terms and conditions of this Contract and any amendment thereto and the terms and conditions contained either within the request for Proposals/Bids or the Response thereto, the terms and conditions of this Contract as well as any amendment shall take precedence and control the relationship and understanding of the parties.

7.14 CONTRACTING WITH LOCALLY OWNED SMALL BUSINESSES:

EMERGE shall take affirmative action to assure that Locally Owned Small Businesses that have been certified by the COUNTY are utilized when possible as sources of supplies and equipment, construction and services.

7.15 LIVING WAGE ORDINANCE AND PREVAILING WAGE ORDINANCE

Living Wage - In accordance with Ordinance Number 328, commonly referred to as the Living Wage Ordinance, all persons/entities engaged in service contracts with the County, including but not limited to both prime and subcontractors, shall pay a Living Wage to employees for all work performed on said service contract, as defined in the Living Wage Ordinance. Proof of such compensation must be evidenced as required in the Living Wage Ordinance.

Prevailing Wage – Any firm, individual, partnership or corporation awarded a contract by the COUNTY for the construction of, improvement, enlargement, alteration or replacement of a public work or project in excess of \$500,000 and any subcontractors of such public work or project in excess of \$100,000 ("Recipient") shall be required to pay local prevailing wages and benefits for laborers, mechanics, or other listed classifications as defined by the Tennessee Department of Labor. The prevailing wage rate shall be the most current State of Tennessee prevailing wage established by the Tennessee Department of Labor For Region 1 (Shelby County). The benefit rates shall be the most current rates described in the published schedule by the Memphis and West Tennessee Building and Construction Trades Council, except as otherwise provided in the Shelby County Code of Ordinances. The applicable rate shall be determined at the time that the project is awarded. In instances where Prevailing wage applies, Prevailing Wage will override the Living Wage requirement.

7.16 RIGHT TO REQUEST REMOVAL OR EMERGE'S EMPLOYEES:

The COUNTY may interview the personnel EMERGE assigns to the COUNTY's work. COUNTY shall have the right, at any time, to request removal of any employee(s) of EMERGE, whom COUNTY deems to be unsatisfactory for any reason. Upon such request, EMERGE shall use all reasonable efforts to promptly replace such employee(s) with substitute employee(s) having appropriate skills and training.

7.17 INCORPORATION OF WHEREAS CLAUSES:

The foregoing whereas clauses are hereby incorporated into this Contract and made a part hereof.

7.18 DISCLOSURE OF REPORTS, DATA OR OTHER INFORMATION:

Notwithstanding anything to the contrary contained herein or within any other document supplied to COUNTY by EMERGE, EMERGE understands and acknowledges that COUNTY is a governmental entity subject to the laws of the State of Tennessee and that any reports, data or other information supplied to COUNTY by EMERGE due to Services performed pursuant to this Contract is subject to being disclosed as a public record in accordance with the laws of the State of Tennessee.

7.19 This Agreement may not be assigned or transferred without the prior written consent of the other party hereto.

7.20 This Agreement does not and shall not be construed to create a partnership or joint venture between the parties hereto.

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IN WITNESS WHEREOF, the parties by and through their fully authorized representatives, have executed this AGREEMENT BETWEEN SHELBY COUNTY GOVERNMENT AND MEMPHIS INCUBATOR SYSTEMS, INC., DBA, EMERGEMEMPHIS, for use of grant proceeds for infrastructure improvements as of the date above written.

APPROVED:

SHELBY COUNTY GOVERNMENT

Contract Administrator/
Assistant County Attorney

Joe Ford, Interim Mayor

MEMPHIS INCUBATOR SYSTEMS, INC.
DBA EMERGEMEMPHIS

BY: [Signature]

TITLE: President

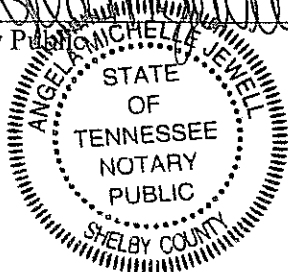
CORPORATE ACKNOWLEDGMENT

STATE OF Tennessee
COUNTY OF Shelby

Before me, the undersigned Notary Public, in and for the State and County aforesaid, personally appeared Mr. Gwin C. Scott, with whom I am personally acquainted or proved to me on the basis of satisfactory evidence, and who, upon oath, acknowledged himself/herself to be president or other officer authorized by appropriate Corporate action and/or Resolution to execute the preceding instrument of the _____, the within named bargainor, a corporation, and that he as such _____, executed the foregoing instrument for the purpose therein contained by signing the name of the corporation by himself/herself as president.

WITNESS my hand and official seal at office this 11th day of January, 2010.

[Signature]
Notary Public



My Commission Expires: MY COMMISSION EXPIRES: March 31, 2010